



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

David Bauer, Treasurer
McClintock for Congress
1029 K Street, #44
Sacramento, CA 95814

DEC 3 0 2008

RE: MUR 6010

Dear Mr. Bauer:

On May 19, 2008, the Federal Election Commission notified McClintock for Congress and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On December 18, 2008, the Commission found, on the basis of the information in the complaint, and information provided by Partnership for America and McClintock for Congress, that there is no reason to believe McClintock for Congress and you, in your official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a(f), or 441b. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, are enclosed for your information.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, reading "Stephen A. Gura".

Stephen A. Gura
Deputy Associate General Counsel
for Enforcement

Enclosures
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

**Respondent: McClintock for Congress and David Bauer,
in his official capacity as treasurer**

MUR: 6010

I. INTRODUCTION

This matter arises out of a complaint alleging that McClintock for Congress and David Bauer, in his official capacity as Treasurer, violated the Federal Election Campaign Act of 1971, as amended ("the Act"), when they coordinated with Partnership for America, in the making of expenditures in connection with Mr. McClintock's primary election on June 3, 2008.

II. FACTUAL AND LEGAL ANALYSIS

Tom McClintock is a California state senator and the 2008 Republican nominee for the House of Representatives for California's Fourth Congressional District. Partnership for America is a nonprofit corporation organized under 26 U.S.C. § 501(c)(4) and headquartered in Colorado. It is "comprised of Americans who support public policies that seek to restore a common sense balance between economic growth and environmental conservation." See <http://www.partnershipforamerica.org>. The organization's stated goals are to create "environmentally sound development" and "access to affordable and reliable supplies of goods," and to boost "economic growth" through job creation. See <http://www.partnershipforamerica.org/about/whatwebelieve.asp>.

The complaint alleges that Partnership for America, McClintock for Congress, and David Bauer in his official capacity as Treasurer, engaged in coordinated communications by funding an "illegal independent expenditure and/or issue advocacy 'campaign'" to influence the outcome of the June 3, 2008 Republican primary election.

1 Complaint at 2 and Exh. A. Specifically, the complaint asserts that an individual named
2 Steven J. Ding promoted and solicited funds for Partnership for America's campaign by
3 e-mail and at a meeting of Indian gaming tribes at the same time he was a paid
4 "employee/consultant" of the McClintock committee.¹ See *id.* at 4 and Exhs. A, C. By
5 contrast, the article attached to the complaint states that Mr. Ding "was on McClintock's
6 campaign payroll until a few weeks" before the meeting. Complaint Exh. B (David
7 Whitney, McClintock Independent Campaign Effort Questioned, The Sacramento Bee,
8 Apr. 26, 2008, available at <http://www.sacbee.com/111/story/891275.html>). The
9 complaint attaches a three-page document entitled, "CA-4 CONGRESSIONAL ISSUE
10 ADVOCACY CAMPAIGN," that, according to the complaint, was prepared and
11 distributed by Partnership for America through its agent, Mr. Ding. See *id.* at Exh. A.
12 The document states that Partnership for America "is launching a campaign to highlight
13 certain issue positions [of] the candidates in the Fourth District of CA," proposes a
14 timeline of activities and a budget of \$660,000 for the primary campaign, and describes
15 its strategy and purpose as follows:

16 We will aim to create a political environment by which the most
17 conservative candidate's messages on taxes, economic development; gun
18 rights; immigration, and other key issues will lead to higher turnout among
19 like minded people who care about those issues. That, in turn, will create
20 a better scenario for the conservative candidate (who is aligned with our
21 beliefs) to achieve victory in the primary as well as the general election in
22 November.

¹ By contrast, the article attached to the complaint states that Mr. Ding "was on McClintock's campaign payroll until a few weeks" before the meeting. Complaint Exh. B (David Whitney, *McClintock Independent Campaign Effort Questioned*, THE SACRAMENTO BEE, Apr. 26, 2008, available at <http://www.sacbee.com/111/story/891275.html>).

1 *Id.* at Exh. A. According to the complaint, Mr. McClintock frequently touted himself in
2 communications as “the most conservative” candidate in the primary election. *See id.* at
3 4.

4 The allegations in this matter raise the question of whether McClintock for
5 Congress and David Bauer, in his official capacity as Treasurer, knowingly accepted
6 excessive and prohibited contributions and failed to disclose them in violation of 2 U.S.C.
7 §§ 441a(f), 441b and 434(b). Under the Act, no person may make a contribution,
8 including an in-kind contribution, to a candidate and his or her authorized political
9 committee with respect to any election for Federal office, which, in the aggregate,
10 exceeds \$2,300. 2 U.S.C. § 441a(a). In addition, the Act prohibits direct and in-kind
11 contributions by corporations. *See* 2 U.S.C. § 441b; *see also* 11 C.F.R. § 114.10(d)(3).
12 The Act defines in-kind contributions as, *inter alia*, expenditures made by any person “in
13 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate,
14 his authorized political committees, or their agents.” 2 U.S.C. § 441a(a)(7)(B)(i). A
15 communication is coordinated with a candidate, an authorized committee, a political
16 party committee, or agent thereof if it meets a three-part test:² (1) payment by a third-

² After the decision in *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (Appeals Court affirmed the District Court’s invalidation of the fourth, or “public communication,” content standard of the coordinated communications regulation), the Commission made revisions to 11 C.F.R. § 109.21 that became effective July 10, 2006. In a subsequent challenge by Shays, the U.S. District Court for the District of Columbia held that the Commission’s content and conduct standards of the coordinated communications regulation at 11 C.F.R. § 109.21(c) and (d) violated the Administrative Procedure Act; however, the court did not vacate the regulations or enjoin the Commission from enforcing them. *See Shays v. F.E.C.*, 508 F.Supp.2d 10, 70-71 (D.D.C. Sept. 12, 2007) (NO. CIV.A. 06-1247 (CKK)) (granting in part and denying part the respective parties’ motions for summary judgment). Recently, the D.C. Circuit affirmed the district court with respect to, *inter alia*, the content standard for public communications made before the time frames specified in the standard, and the rule for when former campaign employees and common vendors may share material information with other persons who finance public communications. *See Shays v. F.E.C.*, 528 F.3d 914 (D.C. Cir. 2008). This decision does not impact this matter, however, because there is no information that any communication was funded by Partnership for America.

1 party; (2) satisfaction of one of four “content” standards;³ and (3) satisfaction of one of
2 six “conduct” standards.⁴ See 11 C.F.R. § 109.21.

3 In this matter, while Mr. Ding was a former employee of the McClintock
4 campaign, there is no specific information that Partnership for America ever paid for or
5 made a communication sufficient to satisfy the payment prong at 11 C.F.R.
6 § 109.21(a)(1) or the content standard under 11 C.F.R. § 109.21(c). The only information
7 regarding possible communications by Partnership for America is a vague statement
8 found in its “CA-4 Congressional Issue Advocacy Campaign” memo that “[a]ccording to
9 the ‘timeline,’ research activities were to be commenced in April and it has been reported
10 that a telephone survey has been conducted within the district and presumed to be paid
11 for by Partnership for America.” Partnership for America specifically countered this
12 claim in its response, asserting that it never approved or acted upon the draft plan at issue
13 in any way, and that it received no funds from its membership to fund any actions related
14 to the candidates in the congressional election in the Fourth District of California. While
15 Partnership for America’s response does not provide affidavits or other supporting

³ The content prong is satisfied if the communications at issue meet at least one of four content standards: (1) a communication that is an electioneering communication as defined in 11 C.F.R. § 100.29(a); (2) a public communication that republishes, disseminates, or distributes candidate campaign materials; (3) a public communication containing express advocacy; or (4) a public communication, in relevant part, that refers to a clearly identified federal candidate, is publicly distributed or disseminated 120 days or fewer before a primary or general election, and is directed to voters in the jurisdiction of the clearly identified candidate. See 11 C.F.R. § 109.21(c).

⁴ The conduct prong is satisfied when any of the following types of conduct occurs: (1) the communication was created, produced, or distributed at the request or suggestion of a candidate or his campaign; (2) the candidate or his campaign was materially involved in decisions regarding the communication; (3) the communication was created, produced, or distributed after substantial discussions with the campaign or its agents; (4) the parties contracted with or employed a common vendor that used or conveyed material information about the campaign’s plans, projects, activities, or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; (5) the payor employed a former employee or independent contractor of the candidate who used or conveyed material information about the campaign’s plans, projects, activities, or needs, or used material information gained from past work with the candidate to create, produce, or distribute the communication; or (6) the payor republished campaign material. See 11 C.F.R. § 109.21(d).

1 materials, publicly-available information corroborates its claim that it did not fund such
2 communications.

3 Specifically, Partnership for America's website includes no information
4 suggesting that Partnership for America made expenditures on behalf of Mr. McClintock,
5 and no news articles report communications funded by Partnership for America in the
6 Fourth District. Therefore, based upon the information presented, there is no reason to
7 believe that McClintock for Congress and David Bauer, in his official capacity as
8 Treasurer, violated 2 U.S.C. §§ 441a(f), 441b or 434(b) by receiving and failing to
9 disclose excessive or prohibited contributions.

10 **III. CONCLUSION**

11 Based on the foregoing, there is no reason to believe that McClintock for
12 Congress and David Bauer, in his official capacity as Treasurer, violated 2 U.S.C.
13 §§ 441a(f), 441b or 434(b).